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Supreme Court, U.S.
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Nos. 1080 and 1082.

IN THE

Supreme Court of the United States

October Term, 1946

PHILIP B. FLEMING, Temporary Controls Administrator, - - - - - - Petitioner,

versus

CHRISTINE COLLINS, Et Al., - - - Respondents.

PHILIP B. FLEMING, Temporary Controls Administrator, - - - - - - Petitioner,

versus

WILLIAM M. MORRISON, Et Al., - - Respondents.

On Petition for Writs of Certiorari to the United States Emergency Court of Appeals.

MEMORANDUM FOR RESPONDENTS.

ALLEN P. DODD, SR.,
Marion E. Taylor Building,
Louisville 2, Kentucky,

IRVIN MARCUS,
Kentucky Home Life Building,
Louisville 2, Kentucky,

MAC ASBILL,
1616 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Respondents in Nos. 1080 and 1082.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

CHRISTINE COLLINS, ET AL., - - *Respondents.*

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PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, - - - - - *Petitioner,*

v.

WILLIAM M. MORRISON, ET AL., - *Respondents.*

On Petition for Writ of Certiorari to the United States Emergency Court of Appeals.

MEMORANDUM FOR RESPONDENTS.

OPINIONS BELOW.

Neither the original opinion (R. 310) nor the opinion on petition for rehearing (R. 340) of the Emergency Court of Appeals have been reported.

JURISDICTION.

The judgments of the Emergency Court of Appeals holding Order No. 45 to be invalid were entered on January 2, 1947 (R. 328-329) and the judgment overruling the petition for rehearing was entered on January 30, 1947 (R. 342). The petition for writs of certiorari was filed on February 28, 1947. Jurisdiction of this Court rests on Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 23 as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV 924, making applicable Section 240 of the Judicial Code as amended (28 U. S. C. 347).

QUESTIONS PRESENTED.

1-A. May the Price Administrator substitute his penalty for the penalty prescribed by the Price Act where a sale is made when no applicable ceiling price exists, and the seller fails to apply to the Administrator to fix such a price?

2-A. Whether Section 1499.3(c) of the General Maximum Price Regulation in effect during January, 1943, authorized prescription by the Price Administrator on June 13, 1945, of specific maximum prices applicable to prior sales made by respondents in January, 1943, in the absence of any application by respondents to the Price Administrator for prescription of any maximum prices.

2. Whether Section 2(a) or any other section of the Emergency Price Control Act authorized the prescription by the Price Administrator on June 13, 1945, of specific maximum prices applicable to prior sales made by respondents in January, 1943.

3. Whether specific maximum prices prescribed by the Price Administrator on June 13, 1945, for application to prior sales by respondents in January, 1943, violate the *ex post facto* clause of Article I, Section 9, Clause 3, in the Federal Constitution if attempted to be used to measure "overcharges" in an enforcement action instituted under Section 205(e) of the Act and now pending against respondents in a district court.

4. Whether specific maximum prices prescribed by the Price Administrator on June 13, 1945, for application to prior sales by respondents in January, 1943, violate the due process clause of the Fifth Amendment to the Federal Constitution if attempted to be used to measure "overcharges" in an enforcement action instituted under Section 205(e) of the Price Act and now pending against respondents in a district court.

5. Whether Order No. 45 was illegal and void because it deprived respondents of all rights to protest, under Section 203(a) of the Emergency Price Control Act, the validity of the *measure* of the inchoate prices set out in the Order and to appeal, under Section 204(a) of said Act, from an adverse ruling on any protest since said Order No. 45 and the Opinion accompanying same merely purported to establish conditional, in-

choate ceiling prices which might become "applicable" *only if* certain future findings were made by the District Court during an enforcement trial with the result that respondents were not, within the meaning of Section 203(a) of the Act, "subject to" any definite prices upon the issuance of Order No. 45 and said Order did not immediately, substantially and adversely affect respondents or "prohibit" or "require" action by them within the meaning of Section 24 of Revised Procedural Regulation No. 1.

STATUTE AND REGULATION INVOLVED.

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (hereinafter sometimes referred to as the "Act"), and of the General Maximum Price Regulation (hereinafter sometimes referred to as "G.M.P.R.") are set forth in the appendix to the application for certiorari, except Sections 2(b), 2(d), 205(a) and 205(b) of the Act which are contained in an appendix hereto, *infra* pp. 45 to 46.

STATEMENT.

Prior to December 1, 1942, respondents were the owners and holders of shares of common stock in Cummins Distilleries Corporation, a Delaware corporation engaged in the production and storage of bourbon whiskey in Kentucky (R. 76-92). On December 24, 1942, the corporation was dissolved by a vote of the requisite number of shares (R. 92-96). As part of the

plan of liquidation, warehouse receipts for approximately 51,000 barrels of bourbon whiskey were distributed to the common stockholders, including respondents, by delivery to an authorized stockholders' committee. The certificate of corporate dissolution issued December 31, 1942. Beginning January 4, 1943, and ending January 9, 1943, the stockholders' committee sold the warehouse receipts and collected the proceeds of sale (R. 12, 45).

In January, 1943, M.P.R. 193 was in effect (R. 188). Section 1420.13(a) and (b) of M.P.R. 193 (R. 192-193) did not apply to the sales because respondents made no sales of warehouse receipts in March, 1942, and there were no more closely competitive sellers of the same class whose prices could have been used by respondents as a basis for the establishment of ceiling prices for their sales in January, 1943 (R. 2, 34).

Section 1420.13(c) of M.P.R. 193 provided as a third pricing method, in case neither Section 1420.13 (a) nor (b) of M.P.R. 193 could be applied, that "the seller's maximum price for such domestic distilled spirits shall be determined in accordance with Section 1499.3 of the General Maximum Price Regulation" (R. 194). Section 1499.3 of the G.M.P.R., as amended and in force in January, 1943, provided as follows (R. 216-218):

> "1499.3. *Maximum prices for commodities and services which cannot be priced under §1499.2.* The seller's maximum price for a commodity or service which cannot be priced under §1499.2 of this General Maximum Price Regulation shall be

a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. *Such price shall be determined by the seller in accordance with the following procedures:*

* * * * * * *

"(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price *determined by the seller after specific authorization* from the Office of Price Administration or any duly authorized officer thereof. A seller *who seeks an authorization* to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under §1499.2 or §1499.3(a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. *Such authorization will be given in the form of an order prescribing a method of determining the maximum price.*" (Emphasis supplied.)

Before making their sales in January, 1943, respondents did not file any application with the Price Administrator under Section 1499.3(c) of G.M.P.R. to have him authorize any method whereby respondents

could determine ceiling prices for their whiskey. No such application was ever filed by respondents, and they denied any power of the Price Administrator to prescribe ceiling prices on his own motion (R. 16-18) after the consummation of the sales.

On May 27, 1943, the Price Administrator filed a complaint for treble damages in the United States District Court for the Western District of Kentucky against the corporation and respondents alleging that the whiskey of respondents had been sold in excess of the maximum prices established by Section 1420.13(b) of M.P.R. 193 for their most closely competitive sellers of the same class (R. 59-72). The action is still pending.

Apparently fearing that he might be unable to establish a basis for determining respondents' maximum prices under Section 1420.13(b) of M.P.R. 193, the Price Administrator, on June 13, 1945—over two years after the enforcement action had been filed—issued Order No. 45 under purported authority of Section 1499.3(c) of the G.M.P.R. (R. 185-186), and attempted thereby to establish maximum prices for the prior sales of respondents made in January, 1943. Order No. 45 was not issued on respondents' application as contemplated by Section 1499.3(c) of the General Maximum Price Regulation.

Respondents filed their protests to Order No. 45 (R. 1, 32) basing same on the grounds that the Order was not authorized by Section 1499.3(c) of the G.M.P.R., under which it purported to be issued, nor by Sec-

tion 2 of the Price Act; respondents raised the further issues that Order No. 45 was invalid because in violation of the *ex post facto* clause of Article I, Section 9, Clause 3, of the Federal Constitution and was also violative of the due process clause of the Fifth Amendment to the Federal Constitution. Also, respondents contended that the Order was invalid because inconsistent with Sections 203(a), 204(a) and 204(d) of the Price Act. After denial of the protests by the Price Administrator (R. 146) appeals were perfected to the Emergency Court (R. 223, 274), which ruled that Order No. 45 was invalid because neither authorized by Section 1499.3(c) of the General Maximum Price Regulation nor by Section 2 of the Price Act (R. 328, 342). The Emergency Court did not pass upon the other grounds of invalidity raised in the protests and in the appeals.

NO CONFLICT EXISTS AND DECISION BELOW IS SUPPORTED BY OTHER GROUNDS.

Under Section 204(d) of the Emergency Price Control Act only the Emergency Court,[1] as distinct from a District Court or a Circuit Court, may pass upon the validity of such a retroactive price order as Order No. 45. The Emergency Court held Order No. 45 to be invalid because neither authorized by Section 1499.3(c)

[1]In *Senderowitz* v. *Fleming*, No. 677, and *Martini* v. *Fleming*, No. 813 (both pending on applications for certiorari) the United States Circuit Courts of Appeals for the Third and Ninth Circuits had no jurisdiction to pass upon the validity of the retroactive price orders involved in those cases. Neither case can be said to be in conflict with the ruling of the Emergency Court of Appeals in the instant case. In *Porter* v. *Kramer*, 156 F. 2d 687, no constitutional issues were properly before, and none were decided by, the Circuit Court.

of the General Maximum Price Regulation nor by Section 2 of the Act.

In the case at bar, Order No. 45 was issued by the Administrator on his own initiative and without an application therefor having been filed by respondents. In Porter v. The Sherwood Distillery Co., 156 Fed. 2d 264, the United States Circuit Court of Appeals for the Fourth Circuit held the Administrator not entitled to an injunction compelling the filing of the required application to enable him to fix maximum prices on sales already made for the purpose of establishing a basis for recovery of treble damages. Though a different section of the Price Act was involved, fundamental principles identical with those in the case at bar were involved in the Sherwood Distillery case and these two are the only cases involving these principles which have been decided by courts having jurisdiction to decide them. Both have been decided the same way in principle. In this case, the Emergency Court of Appeals has invalidated the retroactive order issued without an application as basis therefor and in the Sherwood Distillery Case the Circuit Court of Appeals held the administrator without legal right to compel the filing of an application to become the basis on which he could fix prices for sales already made for the sole purpose of collecting treble damages in the pending suit.

Petitioner may not even be a proper party to file an application for certiorari. Bowles v. Johnson, 3 P C, 52625, decided January 30, 1947, by the Municipal Court, City of Long Beach, California; Porter v. Hira-

hara, 3 P C, par. 52628, decided January 29, 1947, by United States District Court for Hawaii.

There is no special or important reason why this obviously correct ruling by the Emergency Court should be reviewed. General price control was ended by Congress some time ago and it is the present public policy to abolish the remaining remnant (now reduced to rents, sugar and rice) as speedily as possible. Hence no rule can be laid down that will have continuing prospective effect on the public at large. The admission by petitioner (p 18 of petition) that the Price Administrator issued a number of similar illegal orders only emphasizes the extent to which the latter official exceeded his statutory authority. Certainly, wholesale violations of the Act by the Price Administrator, and his total disregard for elemental principles of constitutional law, are a false basis upon which petitioner may not successfully predicate any claim that a matter of public importance is involved which requires review by this Court of the ruling below invalidating Order No. 45 and adequately protecting the public from high-handed bureaucratic persecution through use of other such illegal orders.

Indeed, even if the writ should be granted, the decision of the Emergency Court must be affirmed under "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct, 'although the lower court relied upon a wrong ground or gave a wrong reason.'" Securities & Exchange Commission v. Chenery Corp., 318 U. S. 80, 88. In addition to the grounds properly relied upon in the

opinion of the the Emergency Court its ruling invalidating Order No. 45 is obviously correct for three reasons which will be developed *after* an elaboration of the two grounds relied upon by the Emergency Court to support its ruling.

I. Section 1499.3(c) of the General Maximum Price Regulation, in Effect During January, 1943, Did Not Authorize Issuance of Order No. 45.

Order No. 45 states in the first paragraph thereof that it is issued "pursuant to Section 1499.3(c) of the General Maximum Price Regulation" (R. 185).[2]

Section 1499.3 of the General Maximum Price Regulation as in effect in January, 1943 (7 Fed. Reg. 7093; R. 216-218), when the sales in question were made by respondents, provided three *procedures* in subparagraphs (a), (b) and (c) for determining ceiling prices for commodities which could not be priced under Section 1499.2 of the General Maximum Price Regulation. Subparagraphs (a) and (b) need not be considered because Order No. 45 only purports to be issued pursuant to Section 1499.3(c) of the General Maximum Price Regulation. Said subparagraph (c) in effect during January, 1943, provided (R. 216-217):

> "(c) In the case of a *sale at wholesale or retail* of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall

[2]In their protests, par. 2(f) and (g) (R. 4, 36); par. 3(e) and (f) (R. 6, 38) and par. 6 (R. 7, 39), and in their complaints, pages 8, 9, 11 and 13 (R. 231-232, 234-235, 283-284, 285-286), the complainants urged that Order No. 45 was *not* authorized under the Emergency Price Control Act or any regulation issued thereunder, *including Section 1499.3(c) of the General Maximum Price Regulation.*

be a *price determined by the seller* after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who *seeks an authorization* to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under §1499.2 or §1499.3(a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. *Such authorization* will be given in the form of an order *prescribing a method of determining* the maximum price." (Emphasis supplied.)

It will be noted that said subparagraph (c) of Section 1499.3, as in effect during January, 1943, is only applicable "in the case of a sale at wholesale or retail of a commodity which cannot be priced under subparagraph (a)."[3] In such event "the maximum price shall be a price *determined by the seller* after specific authorization from the Office of Price Administration." "Such authorization will be given in the form of an *order prescribing a method of determining the maximum price.*" (Emphasis supplied.) The subparagraph further provides that "a seller who seeks an

[3]We concede the commodity here involved could not be priced under subparagraph (a).

authorization to determine a maximum price" shall file an application furnishing specific information, but does *not* require any seller to seek such an authorization. None of the respondents filed any application seeking authorization to determine a maximum price, and the subparagraph *clearly does not authorize petitioner,* of his own motion, *to promulgate retroactive ceiling prices. Cf. Porter* v. *The Sherwood Distilling Co.,* 156 F. 2d 264.

Moreover, Order No. 45 does not attempt to authorize a "method of determining the maximum price" which respondents may use in "determining" a price. On the contrary, said order in subparagraph (a)(1) prescribes ceiling prices, applicable solely to respondents by name, computed in the identical manner previously prescribed in August, 1942, for other sellers under Section 1420.13 (a) and (b) of M.P.R. 193 (R. 185); *and* Order No. 45 in subparagraph (a) (2) (R. 185) prescribed for respondents by name the dollars and cents prices previously prescribed in Section 1420.13(g) of M.P.R. 193 by Amendment No. 4 thereof, effective February 3, 1943 (R. 200), after the sales here in question. No sane interpretation of Section 1499.3 (c) of the General Maximum Price Regulation, as in effect during January, 1943, can justify issuance of Order No. 45. There being no basis in fact in the regulation, when sales were made in January, 1943, for issuance of Order No. 45, the order is illegal in its entirety. *Kraus & Bros., Inc.,* v. *United States,* 327 U. S. 614, 621, 622; *Conklin Pen Co.* v. *Bowles,* 152 F. 2d 764.

II. The Emergency Price Control Act Did Not Authorize Issuance of Order No. 45.

Section 2(a) of the Act provides that, under prescribed conditions, the Price Administrator may establish such maximum prices as in his judgment "will be" generally fair and equitable and "will effectuate" the purposes of the Act. This section contemplates only "prospective" operation of any prices for commodities so established and does not empower the Price Administrator to establish retroactive prices solely as a basis for the collection of penalties on past sales as Order No. 45 attempts illegally to do. This interpretation of Section 2(a) is demanded by Section 205(e) of the Act which authorizes collection of penalties *only* from one who "violates" (present tense) an existing price regulation.

Decisions of the Supreme Court recognize and state that regulations fixing ceiling prices for commodities are issued pursuant to Section 2(a) of the Price Act. Among such decisions are *M. Kraus & Bros., Inc.*, v. *United States*, 327 U. S. 614, 619, in which the Court considered revised M.P.R. 269, and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 411, in which the Court considered M.P.R. 188. In *Yakus* v. *United States*, 321 U. S. 414, the Court said (p. 420):

> "The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by §2(a) and by §1 of the amendatory Act of October 2, 1942 * * * By §2(a) the Administrator is author-

> ized * * * to promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' when, in his judgment, their prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.' "

M.P.R. 169 was before the court in the *Yakus* case. It further said (p. 422):

> "As is required by §2(a) of the Act it [M.P.R. No. 169] was accompanied by a 'statement of considerations involved' in prescribing it."

and (p. 423):

> "The boundaries of the field of the Administrator's permissible action are marked by the statute * * * In short, the purposes of the Act specified in §1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in §2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards * * *."

and (p. 439):

> "Moreover, §2(a) further authorizes the issue, in the Administrator's judgment, of temporary regulations, effective for sixty days 'establishing as a maximum * * * the price * * * prevailing with respect to any commodity * * * within five days prior to the date of issuance of such temporary regulations' * * *."

Section 2(b) of the Price Act gives the Administrator the same power with respect to the fixing of prices for rents as Section 2(a) does with respect to commodities. *Bowles* v. *Willingham,* 321 U. S. 503, 513, 514.

Section 2(c) of the Act provides that any regulation or order under Section 2 "may be established in such form and manner, may contain such classifications and differentials, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act * * *." Obviously, Section 2(c) does not enlarge the authority granted the Price Administrator under Section 2(a) to promulgate *only* prices which operate "prospectively." Nothing in Section 2(c) can be interpreted to authorize the promulgation of prices which violate the *ex post facto* and due process clauses of the Federal Constitution. Any order issued by the Price Administrator "to effectuate the purposes of this Act," in order to be valid, must be such an order as comes "within constitutional limits," *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railroad Company,* 284 U. S. 370, 388, and must "be consistent with the statute" and "must be reasonable," *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 134. In *Miller* v. *United States,* 294 U. S. 435, the Court said (p. 439):

> "The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears."

Section 2(d) merely authorizes the Price Administrator to issue regulations or orders which "prohibit speculative or manipulative practices * * * or hoarding, in connection with any commodity * * * which in his judgment are equivalent to or are likely to result in price * * * increases * * * inconsistent with the purposes of this Act." This section only authorizes issuance of regulations or orders which operate prospectively, and, obviously, does not empower the Price Administrator to issue retroactive orders which violate the Federal Constitution.

Section 2(g) provides that "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof." This section clearly means that any valid general order which operates prospectively may contain suitable provisions to prevent its evasion; by no stretch of the imagination can this section be interpreted to authorize the issuance of special or individual price regulations which are violative of the restrictions imposed upon the Congress and administrative agencies of the Government by the Federal Constitution. *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railroad Company,* 284 U. S. 370, 388.

Section 201(d) provides that "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act." Necessarily, such "regulations and orders" must not offend constitutional provisions; otherwise, the conten-

tion of the Administrator must be that he was given unbridled license, free from all constitutional restrictions, to do as he pleased, and any such egotistical contention is ridiculous and absurd. Procedural Regulation No. 1, as revised, is an example of the type of regulation and order that may be, and admittedly was, issued under authority of Section 201(d). *Yakus* v. *United States,* 231 U. S. 414, 438; *Bowles* v. *Willingham,* 321 U. S. 503, 508.

Section 202(a) authorizes the Administrator to make studies and investigations, conduct hearings and obtain information "to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act, and regulations, orders, and price schedules thereunder." Clearly, the power to make studies and investigations, conduct hearings and obtain information does not authorize the Price Administrator to issue a price order such as Order No. 45 which is violative of constitutional provisions.

The above analysis of the various sections of the Price Act clearly shows that Order No. 45 was not authorized by Section 2 or any other section of the Price Act. Order No. 45 is "personal government by a petty tyrant instead of government by law." *Bowles* v. *Willingham,* 321 U. S. 503, 537.

Order No. 45 conflicts with the ruling made in *United States* v. *Morgan,* 307 U. S. 183. There the Court (in discussing its prior decision in *Atlantic Coast Line Railroad Co.* v. *Florida,* 295 U. S. 301) said (pp. 195-196):

> "There, as here, the administrative agency could prescribe rates *only for the future* * * *." (Emphasis supplied.)

The same limitation which applies to the Interstate Commerce Commission and the Secretary of Agriculture also limits the Price Administrator to prescription of ceiling prices "only for the future." Furthermore, Section 2(a) of the Price Act may only be interpreted to authorize "prospective" operation of any prices prescribed for commodities.

III. Order No. 45 Is Violative of Article I, Section 9, Clause 3 of the Federal Constitution.

An action by petitioner, as Price Administrator, under Section 205(e) of the Price Act, to collect treble damages on non-governmental purchases, is an action to collect "penalties." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, involves the power of a Federal Court in an enforcement proceeding under Section 205(a) of the Price Act to order restitution of rents collected by a landlord in excess of the permissible maximums. The Court said (pp. 401-2) that Section 205(e) establishes the sole means whereby individuals may ascertain their private right to damages and "whereby the Administrator on behalf of the United States may seek damages in the nature of penalties." The Court further said that (p. 402) "restitution * * * is consistent with and differs greatly from the damages and penalties which may be awarded under Section 205(e)"; when the Administrator seeks "restitution"

under Section 205(a), he does not request the Court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under Section 205(e). Thus, this Court recognizes that on non-governmental sales the government can suffer no damage and that an enforcement action brought under Section 205(e) by the Price Administrator is an action to collect penalties. The penalty is a punishment for infraction of the law. *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 240-41. The character of the penalty is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. *United States* v. *Chouteau,* 102 U. S. 603, 611.

An enforcement action against these respondents pending in the United States District Court for the Western District of Kentucky, in which the Price Administrator proposes to use Order No. 45, has been held to be a penalty action by the United States Circuit Court of Appeals for the Sixth Circuit in an appeal from that part of the case involving warehouse receipts owned by George W. Dant, a stockholder, who died after the sales had been made. In the appeal, *Bowles* v. *Farmers National Bank of Lebanon, Kentucky,* 147 F. 2d 425, the decision of the Circuit Court of Appeals affirmed the prior decision by the District Court in *Cummins Distilleries Corp.* v. *Brown,* 56 F. Supp. 941, in holding that the treble damage action involving the sales of the warehouse receipts distributed to the stockholders of Cummins Distilleries Cor-

poration was for the recovery of penalties. After a full analysis of the treble damage provision of the Price Act, and prior decisions establishing rules to determine whether particular statutes award "penalties," the Circuit Court concluded that the manifest purpose of Section 205(e) was to prevent inflationary tendencies sought to be curbed by the Act as a whole through punishment of violations of the statute by payment of penalties to the Administrator. The Court said (p. 428):

> "The exaction established by this statute clearly falls within the classification of penalty."

Penalties paid to the Price Administrator are not a deductible expense under the income tax law. 4 Mertens' Law of Federal Income Taxation, 1945 Supp., Section 25.36, p. 110.

Not only is the pending enforcement action against respondents one to collect "penalties" but the action is *penal in nature. Bowles* v. *Heckman,* 64 N. E. 2d 660 and *Bowles* v. *Barde Steel Company,* 164 Pac. 2d 692, hold that an action by the Price Administrator under Section 205(e) is *penal in nature.* In *Testa and Fleming* v. *Katt,* Sup. Ct., U. S., No. 431, March 10, 1947, a *private* purchaser sued his seller in a State Court for treble damages predicated upon an alleged over-ceiling sale. In holding that the State Court was not free to refuse enforcement of petitioner's claim this Court said (slip op., p. 3):

> "For the purpose of this case, we assume, without deciding, that Section 205(e) is a *penal*

> statute in the 'public international', 'private international,' or any other sense. * * * For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid *penal* law of the United States than it has to enforce a penal law of another state or a foreign country." (Emphasis supplied.)

This Court must construe Section 205(e) as a *penal* statute in so far as it authorizes an action by the Price Administrator to collect treble damages on non-governmental purchases because the government has suffered no damage in such a case and the sole object of the action must be to *punish* a seller for violation of the Price Act.

The Opinion accompanying Order No. 45 conclusively reveals (R. 186-7) that the Order was concocted by petitioner solely to establish ceiling prices for use as evidence at the trial now pending of the enforcement action previously instituted under Section 205(e) to collect "pecuniary penalties" from respondents for alleged violations of M.P.R. 193 (R. 62-67, 70-71). The ceiling prices attempted to be established under Order No. 45 were not in existence or applicable when sales were made by respondents in January, 1943. Otherwise, there would have been no occasion for the promulgation of Order No. 45. Moreover, under Section 205(e) of the Price Act, there could not be inflicted any "pecuniary penalties" upon respondents for their sales made in 1943 because such sales were not

in excess of any existing applicable ceiling prices.[4] Petitioner cannot deny that Order No. 45 would have the effect of inflicting a "greater punishment" on respondents by subjecting them to "pecuniary penalties" to which they were not theretofore liable.

Without Order No. 45 petitioner cannot prove at the enforcement trial that the sales of respondents were in excess of any established applicable ceiling prices, because no such ceiling prices were in existence and applicable when their sales were made. Order No. 45 is clearly an *ex post facto* regulation which violates Article I, Section 9, Clause 3 of the Federal Constitution, since it not only inflicts a "greater punishment" upon respondents and "alters the legal rules of evidence" under which an overcharge could formerly be established, to-wit: proof of ceiling prices in effect and applicable at the time the sales were made, but also permits "different testimony than the law required," at the time the sales were made in 1943, to prove a violation of Section 205(e). But, worse still, Order No. 45 "creates" specific evidence (new retroactive ceiling prices) which will inflict "pecuniary penalties" upon respondents if overcharges are computed based on the difference between such new retroactive ceiling prices established illegally in 1945 and the price at which the prior sales were made by respondents in 1943. Order No. 45 is illegal and void in its entirety as clearly appears from application to the

[4]Section 1499.3(c) of G.M.P.R., as in effect during January, 1943 (R. 216-217), when sales were made by respondents, neither prescribed a maximum price nor a method or formula by which respondents could determine a maximum price. No regulation was in existence by which a maximum price could be determined by petitioner for the purpose of computing any "overcharge" under Section 205(e) of the Act.

facts of this case of principles announced in decisions of the Supreme Court next to be considered.

In *Calder* v. *Bull,* 3 Dallas 386, the Court enunciated principles for use in determining whether any given law was violative of the *ex post facto* provision in the Federal Constitution. Justice Chase said (p. 390):

> "I will state *what laws* I consider *ex post facto laws,* within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*"

Justice Patterson said (p. 396):

> "The words, *ex post facto,* when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, *and penalties.*" (Emphasis supplied.)

and (p. 397):

> "The enhancement of a crime, *or penalty,* seems to come within the same mischief as the creation of a crime *or penalty;* and therefore they may be classed together." (Emphasis supplied.)

Justice Iredell said (p. 400):

> "They [Federal and State legislatures] shall not pass any *ex post facto* law; or, in other words, shall not inflict a *punishment* for any act which was innocent at the time it was committed; nor increase the *degree of punishment* previously denounced for any specific offense." (Brackets and emphasis supplied.)

Section 205(e) of the Price Act could inflict no pecuniary "punishment" upon respondents when their sales were made in 1943 because such sales were not in excess of any existing, applicable ceiling prices. Order No. 45 *creates* a method of inflicting a "greater punishment" by providing a retroactive means for establishing overcharges and thereby "alters the legal rules of evidence" and permits "different testimony than the law required" at the time the sales were made in 1943, to prove a violation of Section 205(e).

In *Fletcher* v. *Peck*, 6 Cranch 87, Chief Justice Marshall said (p. 138):

> "An *ex post facto* law is one which renders an act punishable in a manner in which it was *not punishable* when it was committed. Such a law may inflict *penalties on the person,* or may inflict *pecuniary penalties which swell the public treasury.*" (Emphasis supplied.)

Obviously, Order No. 45 was promulgated by petitioner, for use in a pending enforcement action against respondents to "inflict pecuniary penalties which swell the public treasury." Respondents were "not punish-

able" under Section 205(e) of the Price Act when their sales were made in 1943 because the sales did not exceed any existing, applicable ceiling prices. Order No. 45 is void as an *ex post facto* regulation because it will render the prior sales "punishable" whereas they were "not punishable" under Section 205(e) when made.

The constitutional protection against *ex post facto* laws applies not only to criminal laws as such but also to *quasi* criminal laws imposing penalties and forfeitures. *Watson* v. *Mercer,* 8 Peters 88, 110; *Boyd* v. *United States,* 116 U. S. 616, 633-34; *Kring* v. *Missouri,* 107 U. S. 221, 228-29; *United States* v. *Chouteau,* 102 U. S. 603, 610, 611, and *United States* v. *Hughes* (D. C. N. Y. 1875), 8 Ben 29, 26 Fed. Cas. No. 15,416.

It is therefore clear that Order No. 45 subjects respondents to penalties, in a pending enforcement action, for exceeding ceiling prices not provided for by any price order when respondents made sales of warehouse receipts to private concerns in January, 1943. Therefore, Order No. 45 is invalid as an *ex post facto* order or regulation and void under Article I, Section 9, Clause 3, of the Federal Constitution, reading:

> "No bill of attainder or *ex post facto* law shall be passed."

Under the principle announced in *United States* v. *Fox,* 95 U. S. 670, sales made in January, 1943, which did not violate any existing ceiling prices may not be made an offense by a subsequent act of petitioner in prescribing ceiling prices for the sales on June 13, 1945.

In other words, the completed sales in January, 1943, which did not violate Section 205(e) when the sales were made cannot become an offense by any subsequent act of the petitioner with which respondents herein had no connection. *United States* v. *Dietrich,* 126 Fed. 676, 685.

Petitioner relies in this prior brief, in *Senderowitz* v. *Fleming,* No. 677, upon three decisions as a basis for his contention that the retroactive order of June 13, 1945, did not violate the *ex post facto* clause of the Federal Constitution. These cases are *Bankers Trust Co.* v. *Blodgett,* 260 U. S. 647; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, and *Calder* v. *Bull,* 3 Dallas 386. Neither of the first two cases involved any *ex post facto* issue with respect to penalties in punishment of a crime, as the ensuing analysis clearly reveals.

Kentucky Union Company v. *Kentucky,* 219 U. S. 140, considered a statute of Kentucky requiring land owners to pay back taxes, and providing that if an owner failed to list or pay the taxes, he was declared to be delinquent and upon an action by the Commonwealth's attorney with full notice to the interested parties, the land could be forfeited to the Commonwealth. The Court of Appeals of Kentucky held that the portion of the law *imposing penalties* of a character not theretofore imposed upon the land owner was separate from the other provisions of the law; that this imposition was *invalid* and that upon a payment of the taxes only the former owner could escape the forfeiture. The case then came to the Supreme Court where the judgment below was affirmed. It was held that the Ken-

tucky statute, as interpreted by the State Court, was not invalid because of the *ex post facto* provision in the Federal Constitution. Mr. Justice Day pointed out (p. 152):

> "We must therefore take the act as the Court of Appeals of Kentucky has construed it, *stripped of the requirement to pay interest and penalties* as a condition of saving the lands from forfeiture."

And the Court held (p. 153):

> "The Kentucky statute as construed by the Court of Appeals of Kentucky *imposes no penalty or punishment* of a *criminal nature* and is *not an ex post facto law* within the meaning of the Federal Constitution." (Emphasis supplied.)

The Kentucky statute was not an *ex post facto* law because the 1906 statute imposed "no penalty or punishment of a criminal nature" and gave claimant until January 1, 1907, to file a petition for the ascertainment of taxes assessable under the statute, and until March 1, 1907, to pay the back taxes. The Supreme Court said (p. 152):

> "But an *ex post facto* law and a retroactive law are entirely different things."

The Supreme Court also pointed out (p. 152) that it is the well-established law that a retroactive taxing statute imposing taxes or providing remedies for their assessment and collection and not impairing vested rights is not an *ex post facto* law. The payment of taxes is entirely a civil matter, the taxes are imposed

on all alike in the same classification and a law of a retroactive nature imposing taxes or providing for their assessment and collection is not in the nature of a criminal or *quasi*-criminal imposition of penalties for alleged violation of law.

In *Bankers Trust Company* v. *Blodgett,* 260 U. S. 647, the Court considered a statute of Connecticut which provided that all taxable property of any estate upon which no tax has been assessed, or upon which no tax has been paid the State during the year preceding the decedent's death, should be liable to a tax of 2% per annum on the appraised inventory value of such property for five years next preceding the decedent's death, with a provision that a personal report might show a payment during the five-year period and obtain a proportionate abatement. There was a right of appeal in the event of dispute over the tax. The Supreme Court held that this statute was not an *ex post facto* law. It said (p. 652):

> "The penalty of the statute was *not* in punishment of a crime, and it is only to such that the constitutional prohibition applies. It has no relation to retrospective legislation of any other description." (Emphasis supplied.)

Order No. 45 here under attack was issued by petitioner for the *sole purpose* of serving as the medium for the *infliction of penalties* upon respondents as *punishment* for their *alleged crime* of making sales in excess of prices permissible under the regulations. The Order is in plain violation of the *ex post facto* clause of the Federal Constitution.

At page 23, *supra,* the principles enunciated in *Calder* v. *Bull* have been quoted, and it has been demonstrated that application of the principles announced in that case, and in other cases cited at pages 23 to 25, *supra,* conclusively show that Order No. 45 is a retroactive order imposing "pecuniary penalties" upon respondents herein in plain violation of the *ex post facto* clause of the Federal Constitution.

The case of *Graham & Foster* v. *Goodcell,* 282 U. S. 409, does not support the issuance of Order No. 45. There the Court said (p. 426):

> "This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached."

In the instant case no liability for penalties under Section 205(e) attached when sales were made in January, 1943, because the sales were not in excess of any existing ceiling prices and respondents did not "violate" (present tense) any existing price order prescribing maximum prices. Order No. 45 does "attempt retroactively to create a liability" in respect to prior sales as to which no liability for penalties had previously attached. See Bowles v. Griffin, 151 F. 2d 458, 461.

Section 205(e) of the Price Act defines "overcharge" as meaning "the amount by which the consideration exceeds [present tense] the applicable maximum price" in effect at the time of sale. (Brackets supplied.) There being no "applicable maximum price" in effect when sales were made by respondents in January, 1943, no standard existed whereby any

"overcharge" could be computed under Section 205(e). Order No. 45 sought to create an "applicable maximum price"—over two years after sales were made—and by its retroactive application determine "overcharges" and impose "pecuniary penalties" upon respondents in direct violation of the *ex post facto* prohibition contained in Article I, Section 9, Clause 3, of the Federal Constitution.[5]

IV. Order No. 45 Is Violative of the Due Process Clause of the Fifth Amendment to the Federal Constitution.

In *Mulford* v. *Smith*, 307 U. S. 38, the statute there before the Court was held not to operate retroactively in violation of the due process clause of the Fifth Amendment because (p. 51):

> "The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated."

Exactly the opposite situation exists in the instant case. There can be no question but that Order No. 45 was issued to, and will, operate retroactively because its sole purpose was to establish retroactive ceiling prices for application to sales completed over two and one-half years before issuance of the infamous order.

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[5]No cause of action could exist *unless* an "applicable maximum price" was in existence at the time of the sales in January, 1943. Order No. 45 was issued on June 13, 1945, and purported to create *new* "applicable maximum prices." At that time—June 13, 1945—any further cause of action, under Section 205(e), for prior sales in January, 1943, was extinguished by the lapse of over one year from the dates the prior sales were made. *Matheny* v. *Porter*, 158 F. 2d 478, 479.

Clearly, Order No. 45 will deprive respondents of their property without due process of law in violation of the Fifth Amendment by subjecting them to enormous pecuniary penalties approximating seven million dollars based on ceiling prices which were not in effect when their sales were made in January, 1943.

Any cause of action for penalties is created and limited by the Price Act. Section 205(e) of that Act subjects a seller to penalties only if he violates (present tense) an existing price order. Section 205(e) "will not be construed retroactively to create liability. To give it that effect would be to deprive defendant [respondents] of his property without due process of law in contravention of the Fifth Amendment." *William Danzer & Co., Inc.*, v. *Gulf & Ship Island Railroad Company*, 268 U. S. 633, 637.

There is no similarity between the facts of and issues in cases[6] cited at pages 11 to 12 of respondents' brief in Senderowitz v. Fleming, No. 677, and the facts and issues of the case here involved. In none of the cases cited by petitioner in which the courts have upheld retroactive statutes has there been involved the issue as to the right of the Government to collect penalties through penal actions based on an *ex post facto* administrative order such as Order No. 45. Order No. 45 far more plainly is "arbitrary, capricious and

[6]For example, the cases of *United States* v. *Heinszen & Co.*, 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, involved the legality of acts of Congress enacted to ratify prior collection of duties and raised the simple issue whether Congress possessed the power to ratify; this Court held that it did. *Charlotte Harbor Ry. Co.* v. *Welles*, 260 U. S. 8, applied the principle of the above cases and held that a state legislature possessed the power to ratify a special improvement tax.

amounts to confiscation" than did the tax and other statutes declared to be violative of the Fifth Amendment in *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Untermyer* v. *Anderson*, 276 U. S. 440; *Coolidge* v. *Long*, 282 U. S. 582; *Ettor* v. *Tacoma*, 228 U. S. 148; and *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139.

V. Order No. 45 Deprives Respondents of Their Rights Under Sections 203(a) and 204(a) of the Emergency Price Control Act.

Order No. 45 attempts to prescribe inchoate, conditional ceiling prices which "will be applicable only" in the event the District Court finds at the actual trial of the pending enforcement action that maximum prices for sales of warehouse receipts of bulk whiskey in January, 1943, could not be established under Section 1420.13(a) or (b) of M.P.R. 193 (R. 187). Naturally, respondents cannot now exercise their statutory rights to protest, under Section 203(a), and appeal, under Section 204(a) to the Emergency Court of Appeals, against the measure of inchoate ceiling prices that in no event could become applicable except during the actual trial of the enforcement action. Within the meaning of Section 203(a) of the Act, respondents are not now "subject to" inchoate ceiling prices which by the Opinion accompanying Order No. 45 are not applicable but which may become applicable at some later date. *Cf. Parker* v. *Fleming*, No. 80, decided January 20, 1947, by this Court. Furthermore, Section 24 of Revised Procedural Regulation No. 1 specifically provides:

> "A person is * * * *subject to* a provision of a maximum price regulation *only if* such provision *prohibits* or *requires* action by him." (Emphasis supplied.)

and Order No. 45 neither "prohibits" nor "requires" any action by respondents at this time with respect to the *measure* of the inchoate ceiling prices.

Since the inchoate prices attempted to be conditionally prescribed in the Order are to become "applicable" *only* upon findings by the District Court at the actual trial of the pending enforcement action, respondents will, if the inchoate prices ever become applicable, be deprived of all rights under Sections 203(a) and 204(a) of the Act to protest the *measure* of the prices after they become applicable. Time would not permit the filing or processing of a protest and appeal to the Emergency Court under Section 204(a) after a ruling by the District Court at the trial. No power exists in the Price Administrator to issue orders, such as Order No. 45, which deprive respondents of their plain rights under Section 203(a) and Section 204(a). In effect, Order No. 45 operates to repeal Sections 203(a) and 204(a) of the Act because it makes both sections unavailable to respondents to contest the measure of the inchoate ceiling prices conditionally prescribed in the Order even should the prices later become applicable during the trial of the enforcement action. Thus, Order No. 45 deprives respondents of due process of law in violation of the Fifth Amendment to the Federal Constitution.

It will be noted that respondents have protested the validity of Order No. 45 in its entirety—as distinct from a protest to the measure of the inchoate, conditional ceiling prices—because they will never be able to protest, under Section 203(a), the measure of the inchoate ceiling prices which are not now applicable but which may become applicable as a result of a ruling by the District Court at the actual trial of the pending enforcement action. Respondents contend that Order No. 45 is illegal in its entirety because the Order (a) is not in accordance with law, (b) is not authorized by Section 1499.3(c) of the General Maximum Price Regulation, (c) is not authorized by Section 2, or any other section of the Price Act, (d) is violative of Article I, Section 9, Clause 3 of, and the Fifth Amendment to, the Federal Constitution, and (e) is violative of and in conflict with Sections 203(a), 204-(a), 204(d) and 205(e) of the Price Act. If the contentions of respondents are sound, Order No. 45 is invalid in its entirety.

No self-serving interpretation of Order No. 45, and Opinion accompanying same, by petitioner (as attempted by his intermediate orders of May 2 and 15, 1946, R. 130, 143, entered after the general protest was filed) can (1) make legal an Order which was obviously invalid *ab initio,* or (2) deprive respondents of their constitutional and statutory rights, under unambiguous provisions of the Constitution and the Price Act, to protest the invalidity of ceiling prices when and if they become "applicable" or (3) force respondents now to protest the measure of ceiling

prices which are conditional and not yet "applicable" because the District Court has not made findings which, under the Order and Opinion, are a prerequisite to the new prices ever becoming "applicable." Respondents contend that the orders of May 2 and 15, 1946, were illegal because, within the meaning of Section 203(a), respondents were not "subject to" conditional ceiling prices which were not "applicable" to their prior sales, and no order of petitioner could have the effect of enlarging the meaning of the language in the statute so as to require respondents now to protest the measure of conditional, retroactive ceiling prices which could become "applicable" only if and when certain findings were made by the District Court at some indefinite future time.

VI. Other Decisions Relied upon by Petitioner Are Clearly Inapplicable Because They Did Not Involve Any Ex Post Facto Regulation Imposing Pecuniary Penalties.

Addison v. *Holly Hill Fruit Company,* 322 U. S. 607, was an action brought by employees against their employer for wage payments under the Fair Labor Standards Act, 29 U. S. C. Section 201, *et seq.* This was an ordinary civil action. It was *not* brought by the Administrator to recover any penalties under the law and is in no way analogous to the case at bar. The Supreme Court remanded the case to the trial court with directions to retain jurisdiction until the Administrator made a definition within the authority granted him by the Congress, which definition was essential to

a proper determination of the case. In the instant case, there are controlling *constitutional reasons* why retroactive Order No. 45 may not be permitted to establish "applicable" ceiling prices—over two years after sales have been made—which retroactive prices will be used in an enforcement action under Section 205(e) to inflict *pecuniary penalties* upon respondents approximating $7,000,000, when petitioner seeks to calculate fictitious "overcharges" based on the difference between the prices at which the whiskey was sold in January, 1943, and the "new" retroactive prices illegally sought to be established in June, 1945.

General American Tank Car Corp. v. *El Dorado Terminal Co.,* 308 U. S. 422, was an action brought by a lessor against its lessee to recover amounts due under the contract. Defendant refused to make payments on the ground that the amounts claimed were rebates, illegal under the Interstate Commerce Act, 49 U. S. C. Section 1, *et seq.* The Supreme Court held that the federal court had jurisdiction over this simple contract action, but that the Interstate Commerce Commission was the proper body to determine the validity of the payments, and that the action should not be dismissed but should be held pending the conclusion of appropriate administrative proceedings to establish the validity of the payments. The Interstate Commerce Commission had never acted on the case at all and there is no retroactive or penalty feature involved.

El Dorado Oil Works v. *United States,* 328 U. S. 12, was a sequel to the above case. In its later opinion the Court merely held that the Interstate Commerce

Commission had power to issue an order fixing the amount payable to lessees of privately owned cars out of the mileage allowance made by the carrier for their use.

Thompson v. *Texas-Mexican Ry. Co.,* 328 U. S. 134, involved the right of a lessor to declare the forfeiture of a lease; this Court held that the District Court should not have acted until the Interstate Commerce Commission had determined whether the public interest required the line of railroad to be operated by the lessee rather than the lessor, and that this was a question for the Commission to decide under Section 1(18) of the Interstate Commerce Commission Act. *Smith* v. *Hoboken R. R., Warehouse & S. S. Connecting Co.,* 328 U. S. 123, involved the right of a lessor to terminate traffic rights over its lines by a lessee; this Court held that the District Court should have withheld judgment on the merits until the Interstate Commerce Commission had determined whether the public interest would permit abandonment of operations by the lessee under the traffic agreement. Neither case involved collection of pecuniary penalties by the government under an *ex post facto* regulation, such as Order No. 45.

R. H. Stearns Co. v. *United States,* 291 U. S. 54, involved a claim for refund of a tax which had been credited at the taxpayer's request upon another tax obligation of the taxpayer. The theory of the claim for refund was that a waiver had not been signed by the Commissioner of Internal Revenue. It was held that the taxpayer's request to apply the credit and the

payment by the taxpayer of the balance claimed to be due resulted in his estoppel to take advantage of the waiver not signed by the Commissioner during the term. There is nothing in the instant record to indicate that respondents prevented the Price Administrator from establishing specific maximum prices, applicable to their sales of whiskey, before the sales were consummated. Obviously, the mere failure of respondents to apply for the establishment of maximum prices before their sales were made cannot estop them from contesting the validity of Order No. 45 as not authorized by Section 1499.3(c) of the General Maximum Price Regulation or the Price Act and as an *ex post facto* regulation which violates Article I, Section 9, Clause 3 of the Federal Constitution and deprives them of due process of law in violation of the Fifth Amendment to the Federal Constitution. Petitioner overlooks the fact that Order No. 45 was issued to create the means of enforcing a "pecuniary penalty" upon respondents. The rule is that equitable powers of the court will not be used to enforce a penalty but, on the contrary, will be used to prevent forfeitures and penalties. *Ash Sheep Company* v. *United States,* 252 U. S. 159; *Marshall* v. *Vicksburg,* 15 Wall. 146.

VII. Erroneous Dictum in Opinion of Emergency Court Is No Ground For Grant of Certiorari.

In its original opinion (R. 317) the Emergency Court of Appeals stated that the first sentence of Section 1499.3 of the General Maximum Price Regulation "itself definitely established maximum prices for the complainants."[7] The Court further said that the first sentence of said Section 1499.3 of the G.M.P.R. reading: "The seller's maximum price for a commodity * * * shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation," laid down a "definite standard" (R. 317) and that the District Court in the enforcement action could translate this general standard into dollars and cents prices applicable to the sales of respondents.[8] Such *dictum* of the Emergency Court is obviously erroneous.

The statement of the Emergency Court (R. 317) that subparagraphs (a), (b), (c) and (d) of Section 1499.3 of the General Maximum Price Regulation, as in effect during January, 1943 (7 Fed. Reg. 7093, R. 216-217), provided a "procedure" whereby a seller might himself make a "definite determination of the in-line maximum price" before actually making a sale

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[7]Petitioner admits at page 16, and in note 7 on page 17, of its memorandum in *Senderowitz* v. *Fleming*, Docket No. 677, and at pages 10, 13, 16, 18, of its instant application, that the dictum is erroneous and not in accordance with the Administrator's own interpretation of Section 1499.3 of G.M.P.R. It follows that no special or important reason exists why this Court should correct the erroneous dictum. The error is a matter of insignificance in relation to this application for certiorari.

[8]The protest raised no such point and the Emergency Court has no jurisdiction to consider questions not raised in a protest. Section 204(a) of the Emergency Price Control Act.

clearly shows that the first sentence of the section did not establish a definite ceiling price within the meaning of Sections 2(a), 4(a), 205(b) and 205(e) of the Price Act. Clearly, no "definite standard" or actual existing ceiling price was established, or intended to be promulgated, by the first sentence of Section 1499.3, which merely provided for a "maximum price in line with the level of maximum prices established by this General Maximum Price Regulation," but which maximum price was to be ascertained by resort to the "procedures" contained in the following paragraphs (a), (b), (c) and (d). That the above is the correct interpretation of original Section 1499.3 of the General Maximum Price Regulation is emphasized by the merger of the first and second sentences of the original section into one sentence when the section was amended on June 1, 1944 to read (R. 207):

> "* * * shall be a maximum price in line with the level of maximum prices established by this regulation *and* shall be determined in the following manner." (9 Fed. Reg. 5169-5173.) (Emphasis supplied.)

Under the theory of the Emergency Court, it must be contended that "a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation" was a sufficiently "definite standard" to subject respondents to criminal prosecution under Sections 4(a) and 205(b) and the "pecuniary penalties" under Section 205(e) of the Price Act for making sales in excess of prescribed maximum ceiling prices. Such a "maximum price in

line with the level of maximum prices established by this General Maximum Price Regulation" was not as specific as (certainly no more specific than) the language of the Lever Act prohibiting sales at any "unjust or unreasonable charges," yet the latter statute was held unconstitutional in *Cohen Grocery Co.* v. *United States,* 255 U. S. 81, because it did not constitute an ascertainable standard of guilt and was not adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. The same unconstitutionality would exist with respect to efforts to torture specific maximum prices from the general language in the first sentence of Section 1499.3 of the General Maximum Price Regulation despite the "procedure" prescribed in subparagraph (c) of that section. Until the procedure has been followed no one could guess what "method" would be prescribed by the Price Administrator for the determination of maximum prices by the seller or what maximum prices would be "determined by the seller" under the future authorization of the Price Administrator. That the Price Administrator correctly considered the general language in the first sentence of Section 1499.3 of the General Maximum Price Regulation to be totally inadequate as a basis for the collection of pecuniary penalties, fines or impositions of imprisonment is conclusively shown by the issuance of Order No. 45 on June 13, 1945, and which order was held invalid by the Emergency Court.

The principle of the *Cohen Grocery Company* case, *supra,* was applied in *Kraus & Bros. Inc.* v. *United*

States, 327 U. S. 614. That case involved the construction of the evasion section of a price regulation, and it was held that the evasion section, as worded, prohibited only those tie-in sales which involved secondary products that were worthless or that were sold at artificial prices. This Court said (pp. 621-622):

> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, *the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation.* See *United States* v. *Wiltberger,* 5 Wheat. 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. *The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.*" (Emphasis supplied.)

and (p. 622):

> "A prosecutor in framing an indictment, *a court in interpreting the Administrator's regulations* or a jury in judging guilt *cannot supply*

that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. *The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act.* Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States* v. *Resnick,* 299 U. S. 207." (Emphasis supplied.)

The language just quoted conclusively shows that the Price Administrator could not, and did not, prescribe maximum prices, by use of "vague language" appearing in the first sentence of Section 1499.3 of the General Maximum Price Regulation (R. 216-217), so as to subject respondents to "pecuniary penalties" and to criminal prosecution for making sales at prices in excess of *theoretical* prices that might be computed through a *fantastic* interpretation of such an "indefinite standard." The erroneous *dictum* of the Emergency Court completely disregarded the fundamental principles which were reiterated in the *Kraus Bros.* case.

The principle announced in *Thomas Paper Stock Co.* v. *Porter,* 328 U. S. 50, is applicable in the instant matter. There, the Supreme Court held that, after the Taft Amendment, sales of waste paper were *not* governed by maximum prices based on a standard prior to the determination by the Administrator on Septem-

ber 11, 1943, that there was no practicable alternative to such standardization. Upon the same reasoning, sales by respondents of the whiskey here in issue were not governed by any non-existing maximum prices prescribed by the first sentence of Section 1499.3 of the General Maximum Price Regulation (R. 216-217), as in effect during January, 1943, prior to an application by respondents to the Price Administrator for "authorization" of a "method" of determining maximum prices and the actual "determination by respondents" of maximum prices based on the "method" of determining such prices authorized by the Price Administrator.

CONCLUSION.

The judgment of the Court below is correct. The Court is requested to deny the petition for certiorari.

Respectfully submitted,

ALLEN P. DODD, SR.,
Marion E. Taylor Building,
Louisville 2, Kentucky,

IRVIN MARCUS,
Kentucky Home Life Building,
Louisville 2, Kentucky,

MAC ASBILL,
1616 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Respondents in Nos. 1080 and 1082.

March , 1947.

APPENDIX.

STATUTE INVOLVED.

1. **Emergency Price Control Act.**—The pertinent sections of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. V, 901, et seq.), are as follows:

Section 2 (b). Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

Section 2 (d). Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

Section 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Section 205 (b). Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment.

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